

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

)
Amendment to the Commission's)
Regulatory Policies Governing)
Domestic Fixed Satellites and)
Separate International Satellite)
Systems)

IB Docket No. 95-41

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**CONSOLIDATED REPLY TO OPPOSITIONS OF HUGHES COMMUNICATIONS
GALAXY, INC., AND GE AMERICAN COMMUNICATIONS, INC., TO
PETITION FOR RECONSIDERATION OF PANAMSAT CORPORATION**

PanAmSat Corporation ("PanAmSat"), by its attorneys and pursuant to Section 1.429(g) of the Commission's Rules, hereby replies to the oppositions (the "Oppositions") submitted by Hughes Communications Galaxy, Inc. ("Hughes") and GE American Communications, Inc. ("GE") to the Petition for Reconsideration that PanAmSat submitted with respect to the Report and Order adopted by the Commission in the above-captioned proceeding (the "DISCO Order").¹

In its Petition for Reconsideration, PanAmSat urged the Commission to reconsider two aspects of the DISCO Order: application of the full-financial qualification showing to all FSS applicants and the processing of all international FSS applications in processing rounds. As set forth in the Petition for Reconsideration, those aspects of the DISCO Order undermine the Commission's "primary objective" in this proceeding, which is "to ensure that the U.S. public has available to it the widest range of satellite service offerings from the greatest number of competitors possible."² Measured against this standard, the Oppositions are without merit.³

¹ Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, IB Docket No. 95-41 (rel. Jan. 22, 1996).

² Id. ¶ 40.

³ In addition to undermining competition in the United States, failure to adopt realistic financial qualification standards and application processing procedures will force smaller, innovative (footnote continued)

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I. THE FULL-FINANCIAL SHOWING IS ANTI-COMPETITIVE, INEQUITABLE AND UNNECESSARY TO PREVENT THE WAREHOUSING OF ORBITAL LOCATIONS.

The DISCO Order extends the domestic one-step financial showing standard to all satellite applicants, but provides that applicants for orbital locations in "uncongested" portions of the arc may, upon special waiver request, make a "two-step" financial showing.⁴ Although PanAmSat supports the flexible application of the two-step financial showing, the decision to retain the one-step showing for "congested" portions of the arc undermines the Commission's "primary obligation ... to ensure that the U.S. public has available to it the widest range of satellite service offerings from the greatest number of competitors possible."⁵

A. The Effect Of The Full-Financial Showing Is Anti-Competitive.

The petitions for reconsideration demonstrated that application of the stringent domestic financial standard inhibits the competitive entry of new, innovative satellite operators and, in turn, prevents users of satellite services from having access to a diversity of domestic satellite service providers. It is telling that the only parties that oppose the petitions for reconsideration are the very companies which stand to benefit from its preclusive effect: Hughes and GE.

In contrast, in addition to the entrepreneurial separate system providers which have introduced vigorous competition to the international satellite services market, the U.S. Small Business Administration (the "SBA") urges the Commission to retain the two-step showing, noting that doing so will facilitate the introduction of competition in the overall satellite market and offset certain inherent advantages under the FCC's rules for large operators.⁶ Retaining the full-financial standard for congested portions of the arc will continue to preclude a range of aggressive, innovative companies from offering effective domestic satellite service. This result is directly at odds with the Commission's obligation to encourage the provision of service by the "greatest number of competitors possible."⁷

applicants to seek authorizations from foreign administrations, thereby imperiling the ability of the United States to ensure the efficient use of orbital and spectrum resources.

⁴ DISCO Order ¶¶ 41-42.

⁵ Id. ¶ 40.

⁶ Reply of the Chief Counsel for Advocacy of the United States Small Business Administration to Oppositions to Petitions for Reconsideration, dated May 31, 1996, at 2-7.

⁷ DISCO Order ¶ 40.

B. Application Of The Full-Financial Showing Is Inequitable.

As discussed by Orion in its Petition for Reconsideration and by the SBA in its reply comments, the full-financial showing strongly favors only giant companies, who can appear to “self-fund” their satellite projects.⁸ Under Section 25.140(d)(1) of the FCC’s Rules, in order to satisfy the full-financial standard “self-funded” applicants simply need to demonstrate current assets and operating income sufficient to cover the costs of construction, launch and operation for one year. They are not required to commit irrevocably such assets and income to the applicable satellite project. In this regard, self-funded applicants enjoy an unfair and pronounced competitive advantage over “non-self-funded” applicants, who are required to demonstrate non-contingent, irrevocable financing.

Once self-funded applicants obtain a license grant wholly on the strength of their balance sheets, they are then well-positioned to raise funds for their satellite projects through external financing. Ironically, the entities most dependent on external financing are denied comparable access to the capital markets because, under the full-financial showing approach, they are unable to obtain an authorization from the Commission that would make them an attractive financing candidate to the investment community.

This unfair competitive advantage distorts the market for domestic satellite services and undercuts the Commission’s competitive objectives. Allowing smaller applicants the benefits of the two-step financial showing would go a long way toward ameliorating the inequities inherent in the FCC’s satellite financial qualification requirements. By giving such applicants a conditional license during the first step of the two-step financial showing process, they can seek external financing on an equal footing with the handful of industrial behemoths that now have a lock on the provision of domestic satellite services.

C. The Full-Financial Showing Is Unnecessary To Prevent Warehousing.

GE and Hughes maintain that application of the full-financial showing is the only way to prevent warehousing of scarce orbital resources.⁹ In support of this

⁸ Petition for Reconsideration of Orion Network Systems, Inc. (“Orion”), dated April 11, 1996, at 10-13; Reply of SBA at 5-8.

⁹ Opposition of Hughes at 8; Opposition of GE at 2.

proposition, Hughes points to a number of instances where FSS applicants not required to make a full financial showing ultimately failed to bring their proposed satellites.¹⁰

These arguments ignore the overwhelming success that the two-step approach has been in the international satellite market. Far from contributing to warehousing, the two-stage financial showing enabled PanAmSat to challenge Intelsat's monopoly over the provision of international satellite services. Users of satellite services throughout the world have benefited greatly from the Commission's separate system licensing approach. Indeed, Hughes, GE and AT&T now seek to follow the trail blazed by PanAmSat.

Hughes also ignores the fact that precluding all but the largest companies from qualifying for satellite licenses does not ensure that proposed satellite systems will be implemented in a timely manner. As noted by the SBA, there are a number of instances in which some very large companies failed to build their systems.¹¹ While the full financial showing requirement does little to prevent warehousing and actively undermines competitive entry, the Commission can meet both objectives by adopting the two-step financial showing and by applying and strictly enforcing realistic and firm satellite construction and operational milestones.

**II. THE COMMISSION SHOULD NOT DELAY APPLICATIONS TO OPERATE
INTERNATIONAL SATELLITES BY GROUPING THEM IN PROCESSING ROUNDS.**

As PanAmSat demonstrated in its Petition for Reconsideration, the application of processing rounds to international satellite applications was adopted by the Commission without requisite notice and opportunity to comment and, in any event, is contrary to the public interest. Processing rounds are appropriate, if ever, only when the orbital locations at issue are fungible and there is a single governmental authority dispensing those locations. In no event, however, are these conditions met in the international arena.

¹⁰ Opposition of Hughes at 4-5.

¹¹ Reply of SBA at 4; see also Columbia Petition for Reconsideration at 13, n. 21, noting the failure of Ford Aerospace and Western Union to make use of their assigned orbital locations.

A. Consolidated Processing Rounds Are Inappropriate For International Satellite Applications.

As PanAmSat demonstrated in its Petition for Reconsideration, the application of processing rounds to international satellite applications is contrary to the public interest. Processing rounds are appropriate, if ever, only when the orbital locations at issue are fungible. In almost no event, however, are orbital locations used to provide international service fungible.¹² International operators are required to provide their customers with service that may span several land masses and ocean regions. Thus, a change in orbital location of even one-half of one degree may severely limit the operating parameters of an international satellite. The use of processing rounds for international applications would be, therefore, inappropriate. Significantly, neither GE nor Hughes takes issue with this analysis.

Hughes does take issue, however, with PanAmSat's point that the lack of a single administrator for international arc orbital locations argues against the use of processing rounds for international arc locations.¹³ In support of its argument, Hughes maintains that foreign governments have laid claim to a number of domestic arc orbital locations but that this fact has not prevented the Commission from assigning domestic arc locations in processing rounds.¹⁴

While Hughes is correct that certain foreign administrations have ITU reservations in a number of U.S. domestic arc orbital locations, this is a relatively recent phenomenon. Additionally, while these foreign administrations have reservations in domestic arc locations, foreign administrations to date have not been deploying satellites at these locations.

Rather than arguing in favor of processing rounds, Hughes' observations tend to prove PanAmSat's point: Once foreign administrations begin deploying

¹² Following DISCO I, that includes orbital locations in the domestic arc. In light of the fact that, post-DISCO I, satellite operators will be permitted to provide international satellite service from the domestic arc, the fungibility of orbital locations that has heretofore characterized domestic arc orbital locations is breaking down. For example, if an operator seeks to provide service to the U.S., Latin America and Western Europe from 71° W.L., that operator will not view 127° W.L. as fungible with 71° W.L., notwithstanding the fact that either location is suitable for the provision of purely domestic U.S. service.

¹³ Opposition of Hughes at n. 43.

¹⁴ Id.

satellites at domestic arc locations, FCC processing rounds will be unworkable for domestic arc locations in the same manner that they are unworkable for non-domestic arc locations. The FCC cannot hold a processing round at the same time that foreign administrations are authorizing satellites at locations subject to such processing round. While the Commission can deny landing rights to these foreign licensed satellites unless they participate in FCC processing rounds (as the Commission has proposed it will do in its DISCO II NPRM¹⁵), PanAmSat believes that it makes more sense to evaluate a foreign-licensed operator's request to provide service to, from or within the United States on a case-by-case basis.

B. The Commission's Decision to Change Its Policy Regarding The Use Of Domestic Processing Rounds For Applications To Operate International Satellites Was Procedurally Defective.

In addition to being contrary to the public interest, the Commission's decision to alter its international satellite processing policy was flawed procedurally. As PanAmSat noted in its Petition for Reconsideration, nowhere in the DISCO I NPRM did the Commission indicate that it was considering revisions to its FSS processing policies or that, in particular, it was proposing to license separate system satellites in processing rounds.

GE claims that the Commission's change in its processing policy for separate system applications was one of "agency organization, procedure, or practice" exempt from the notice requirements of the APA.¹⁶ GE bases this argument, however, on distinctions between "substance" and "procedure" that long-ago have been abandoned by the courts.¹⁷ As the D.C Circuit explained, "[t]he issue, therefore, is one of degree, and our task is to identify which substantive effects are sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA."¹⁸

¹⁵ Notice of Proposed Rule Making, IB Docket No. 96-111 (May 14, 1996) at ¶ 16 ("DISCO II NPRM").

¹⁶ Opposition of GE at 6 (citing 5 U.S.C. § 553(b)(A)).

¹⁷ Air Transport Ass'n v. DOT, 900 F.2d 369, 378 (D.C. Cir. 1990) ("The characterizations 'substantive' and 'procedural' — no more [in determining the reach of the Section 553(b)(A) exception] than elsewhere in the law — do not guide inexorably to the right result, nor do they really advance the inquiry very far."), remanded, 498 U.S. 1077 (1991), vacated as moot, 933 F.2d 1043 (D.C. Cir. 1991).

¹⁸ JEM Broadcasting Co. v. FCC, 22 F.3d 320, 327 (D.C. Cir. 1994) (quotation omitted).

The Commission's new processing policy stands to delay by a number of years the launch of new satellites while the then-current processing round is resolved and a new processing round is begun. Because international satellite operators must compete with satellite operators that are not forced into processing rounds, the delay occasioned by the use of consolidated processing rounds will change significantly the manner in which U.S.-licensed international satellite operators will proceed with the expansion of their systems.¹⁹ Thus, this change in "procedure" will have a serious substantive impact and in no way was exempt from the notice requirements of the APA.

Second, both GE and Hughes claim that the change in the Commission's processing policies effected in the DISCO Order "was not only a logical, but a necessary result" of the proceeding.²⁰ Neither, however, is able to cite to any language in the DISCO NPRM even hinting that the Commission was contemplating a change in the processing of international applications. Instead, both GE and Hughes assert that the new processing policy follows as a necessary outcome of the DISCO NPRM because, once the "substantive differences were removed, separate systems became indistinguishable from domestic satellite systems. The rationale for processing applications differently ... accordingly disappeared."²¹ As a factual and logical matter, this simply is not so.

Neither Hughes nor GE have explained why the harmonization of certain "substantive" application requirements requires that applications for separate system space stations in uncrowded portions of the orbital arc should be processed in consolidated processing rounds, which were designed to deal fairly with competing applications in the crowded domestic arc. To the contrary, there are a number of rules that may be in the public interest in the domestic arc but, because of the scarcity and fungibility of available orbital locations, would be inappropriate in the

¹⁹ In this way, the present circumstances are distinguishable from those in Neighborhood TV Co. v. FCC, 742 F.2d 629 (D.C. Cir. 1984). The rule at issue in that case affected the manner in which the Commission processed translator applications without substantially affecting the rights of the parties.

²⁰ Opposition of GE at 8; see also Opposition of Hughes at 12. Elsewhere, Hughes argues that "the uniform FSS processing procedures are ancillary to the uniform regulatory policy announced in the DISCO Notice." Opposition of Hughes at 13. Of course, to satisfy the APA, the rule adopted must be a "logical outgrowth" of the rule proposed, not merely "ancillary" to it.

²¹ Opposition of Hughes at 12; see also Opposition of GE at 8 ("the adoption of consistent processing rules for all FCC applicants was mandated by the Commission's overall policy decision to treat all FCC systems under a unified regulatory scheme") (emphasis added).

international arc.²² Indeed, the Commission in the DISCO Order itself preserved a different financial standard (*i.e.*, the two-step standard), on a waiver basis, for applications in uncongested portions of the orbital arc,²³ belying the claims by GE and Hughes that a uniform processing rule for domestic and international applications is “mandated” by the changes made to the substantive satellite standards in the DISCO Order.

Further, as PanAmSat noted in its Petition for Reconsideration, the notion that a unified processing policy necessarily followed from the proposed changes in the DISCO NPRM is refuted by the Commission’s own conduct in the months following the issuance of the DISCO NPRM, during which time the Commission indicated on two occasions that it contemplated a separate rulemaking proceeding addressed specifically to the satellite licensing issue.²⁴ There is no reason the Commission would have done so if, as claimed by Hughes and GE, the result followed as a logical outgrowth from the unification of the domestic and international satellite standards.²⁵

Ironically, Hughes argues that these public notices could not reflect upon the Commission’s intentions in the DISCO rulemaking because they addressed a “substantially broader range of issues” than those in the DISCO NPRM.²⁶ Hughes cannot have it both ways: Either the use of consolidated processing rounds is among the “broader range of issues” not covered in the DISCO NPRM, or the public notices directly contradict any implication in the DISCO NPRM that the issue would be resolved in that rulemaking. In short, there was no reason that the public should have anticipated that the Commission would, in the DISCO Order, extend domestic consolidated processing rounds to separate system applications.

²² See n. 12, *supra*.

²³ See DISCO Order at ¶¶ 41-42.

²⁴ Public Notice, “International Bureau to Review Satellite Licensing Policies” (Sept. 20, 1995); Public Notice, “Roundtable Date Set On Satellite Licensing Policies” (Nov. 21, 1995).

²⁵ This also serves to distinguish Mt. Mansfield Television v. FCC upon which Hughes relies. In that case, the rule adopted was “implicit in the purpose” of the rule proposed. There is no similar implicit interrelation in this case.

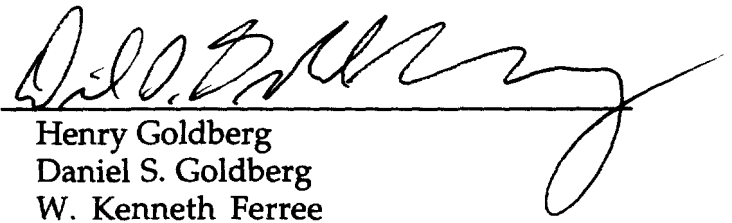
²⁶ Opposition of Hughes at 14.

CONCLUSION

For the reasons stated herein and in PanAmSat's Petition for Reconsideration, PanAmSat urges the Commission to reconsider those portions of the DISCO Order related to the adoption of processing rounds for international FSS applications and the applicable financial qualification standards.

Respectfully submitted,

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June 5, 1996

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Consolidated Reply to Oppositions of Hughes Communications Galaxy, Inc., and GE American Communications, Inc., to Petition for Reconsideration of PanAmSat Corporation was sent, as indicated below, either by hand or by first-class mail, postage prepaid, this 5th day of June, 1996, to each of the following:

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